



October 29, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-6130

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171370.

The Texas Department of Transportation (the "department") received a request for any and all information "related to environmental issues associated with the temporary and permanent inspection stations" at the World Trade Bridge and the Columbia Solidarity Bridge in Laredo, Texas. You have informed this office that the department will release some of the responsive information to the requestor. You claim, however, that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered the comments submitted by an attorney with the requestor's firm. *See* Gov't Code § 552.304 (providing for submission of public comments).

You indicate that the requestor has clarified her request and that "[i]t is now clear that the request applies only to documents related to environmental issues." Therefore, we agree that any of the submitted information that does not relate to environmental issues is not

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

responsive to the present request and need not be released to the requestor. You instruct this office to “disregard any [of the submitted] documents that do not relate to environmental issues.” Upon review of the submitted information, however, it is unclear to this office which of the submitted documents, if any, are not responsive to the present request. Therefore, we will leave that determination to the department.

As we are unable to determine which of the submitted documents are not responsive to the present request, we will address your claimed exceptions with respect to all of the submitted information. We note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov’t Code § 552.022(a)(1), (5). The submitted documents include portions of completed reports, which we have marked. The completed reports are subject to section 552.022(a)(1). Furthermore, other documents, which we have also marked, appear to be working papers used to estimate the expenditure of public funds by a governmental body. If the estimates associated with these documents have been completed, the documents are public under section 552.022(a)(5). As prescribed by section 552.022, the documents that are subject to section 552.022(a)(1) must be released to the requestor unless they are confidential under other law or excepted from disclosure under section 552.108.² Further, the department may not withhold the documents that are subject to section 552.022(a)(5), if the estimates associated with these documents have been completed, unless such information is confidential under other law. Section 552.103 is a discretionary exception under the Public Information Act and does not constitute “other law” for purposes of section 552.022. *See*

²Because you do not raise section 552.108, we do not address the applicability of this exception to disclosure.

Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As you raise no other exception with respect to the information that is subject to section 552.022, to the extent such information is responsive to the present request, it must be released to the requestor.

We will now address your arguments against disclosure with respect to the responsive information that is not subject to section 552.022. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

.....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit,

litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this case, you explain that the City of Laredo met in executive session on August 8, 2002, and voted to file a lawsuit against the department regarding the border inspection stations that are the subject of the present request. As the department received the present request on August 12, 2002, we conclude that the department reasonably anticipated litigation on the date it received the present request, and thus, it has met the first prong of the section 552.103 test. *Cf.* Open Records Decision No. 336 (1982) (litigation reasonably anticipated where complaint filed with the Equal Employment Opportunity Commission). Further, we conclude that the remaining submitted information is related to the anticipated litigation for purposes of section 552.103, and is therefore excepted from disclosure under this section.³

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to the opposing party in the anticipated litigation may not be withheld under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize: (1) any of the submitted information that does not relate to environmental issues is not responsive to the present request and need not be released to the requestor; (2) to the extent the information that is subject to section 552.022 is responsive to the present request, such information must be released to the requestor; and (3) the remaining requested information may be withheld under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

³As we are able to make this determination, we need not address your remaining arguments against disclosure.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 171370

Enc: Submitted documents

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